IN THE

# Supreme Court of the United States

OCTOBER TERM—1943

No. 827

ELEANOR G. MURPHY,
*Petitioner.*

*against*

THE CITY OF ASBURY PARK,
a Municipal Corporation,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS



### TABLE OF CASES

## Other Authorities Cited

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### Opinions Below

The opinion of the Circuit Court of Appeals is reported in 139 Fed. (2nd) 888, and is printed at pages 101-e to 101-i of the record.

The opinion of the District Court of New Jersey is reported in 49 Fed. Supp. 39, and is printed at pages 85-a to 98-2 of the record.

### Statement

This case arose as the result of an accident which occurred January 20, 1940, at Asbury Park, a municipality in the County of Monmouth and State of New Jersey. The petitioner was a passenger in an automobile, riding in a

northerly direction along Ocean Avenue in Asbury Park. The automobile collided with the concrete base of a standard erected in the center of Ocean Avenue by the municipality. Ocean Avenue is a street which runs in a northerly and southerly direction, parallelling the boardwalk and the Atlantic Ocean. The accident occurred at the intersection of Ocean Avenue and Sixth Avenue. Sixth Avenue is a street which runs in an easterly and westerly direction, coming to a dead end at Ocean Avenue. Along the center of Ocean Avenue for substantially its length was erected a series of standards, the standard in question being one of the series. The standards had bell-shaped concrete bases, the bottom of which was 4′ in diameter and its height was 3½′. From the top of the base, a vertical metal column extended about 10′, at the top of which was an electric light fixture. Some of the poles had traffic lights attached to them. The particular standard identified with the collision did not, at the time. A sign was inlaid on its base, reading "Sixth Avenue," and the base had painted on it the words "No center parking."

The case was tried before the Honorable PHILIP FORMAN, District Court Judge, and a jury on May 19, 20, 25 and 26, 1942. At the end of the plaintiff's case, the defendant, the City of Asbury Park, moved for a non-suit and at the close of the case moved for a directed verdict upon the ground that the structure in question was one authorized by State statute and that the City was, therefore, not liable for any damages as the result of a collision with the same. These motions were denied by the Trial Judge and the jury returned a verdict in favor of the plaintiff. Upon appeal, the Circuit Court of Appeals for the Third Circuit reversed the judgment on the grounds that the facts in the case were such that they came directly within the facts and law as

stated by the New Jersey Court of Errors and Appeals in the case of *Lorentz* v. *Public Service Railway Co.*, 103 N. J. L. 104, 134 Atl. 818, and also that the facts came within the ruling in the case of *Delaware, Lackawanna & Western R. R. Co.* v. *Chiara*, 95 Fed. 2nd 663, which cases both held that a structure which would ordinarily be a nuisance may be legalized by statute.

The respondent, City of Asbury Park, relied upon two statutes of the State of New Jersey for its contention that the standards were legalized, and, therefore, the plaintiff could not recover. These statutes will be more fully discussed in the arguments to follow. It also relied upon two local ordinances based upon these statutes which provided for the erection of the standards and the payment for the same.

## POINT I

**The light standard erected in the middle of the street by the City pursuant to legislative authority and pursuant to an ordinance authorizing its construction was not a nuisance but was a device of which motorists using the street were bound to take notice and no action could lie as the result of a collision with the standard.**

The proposition of law embodied in this point is that when a municipality, pursuant to legislative authority, erects a device such as the one in question, in a public street, such a construction is not a nuisance but on the contrary is a legalized obstruction of which the public must take notice. In such circumstances the municipality is not guilty of any act of wrongdoing but is deemed to have proceeded within the powers conferred upon it by the Legis-

lature. This is particularly true if the municipality has exercised its power pursuant to an ordinance as it did in the instant case, although the enactment of such an ordinance is not essential in order to render the municipality immune from liability.

In New Jersey the Legislature as early as 1917 granted such authority to municipalities. The so-called "Home Rule Act" (P. L. 1917, chapter 152, p. 410, Article XXIV, paragraph 1) as amended and included in the 1937 revision of the New Jersey statutes (R. S. 40:67-13) reads as follows:

> "40:67-13. Street lighting; lands, buildings, and equipment.
>
> "The governing body may by ordinance cause the streets, highways, parks and public places of the municipality to be lighted and erect and maintain on and in such streets, highways, parks and public places all proper poles, conduits, wires, pipes, fixtures and equipment and may acquire by purchase, condemnation or gift all necessary real estate and erect thereon all necessary buildings and equip the same with necessary equipment and machinery, all at public expense."

The 1917 act above was supplemental by a statute passed in 1923 (P. L. 1923, chapter 92, p. 178) which, with its amendments, is embodied in the revision of 1937 (R. S. 40:67-16), reading as follows:

> "40:67-16. Safety zones and other structures for traffic regulations; exceptions:
>
> "The governing body may establish safety zones, erect, construct and maintain platforms, commonly called 'safety isles'; standards commonly called 'silent policemen,' beacon light, guideposts and other structures which it may deem necessary for the

safety and convenience of persons and vehicles using the streets of such municipality, but no such erections or constructions shall be made, operated or maintained on any state highway without permission of the State Highway Commission; nor shall any such erections or constructions be made, operated or maintained on any county road or county boulevard without permission of the board or body having control of or jurisdiction over such county road or boulevard."

Further legislative authority for the construction of this standard is to be found in R. S. 40:56-1, subdivision J, which reads as follows:

"A local improvement is one, the cost of which, or a portion thereof, may be assessed upon the lands in the vicinity thereof benefited thereby.

"Any municipality may undertake any of the following works as a local improvement; and the governing body thereof may make, amend, repeal and enforce ordinances for carrying into effect all powers granted in this section;

"* * * The installation of such lighting standards, appliances and appurtenances as may be required for the brilliant illumination of the streets in those parts of the municipality where the governing body of the municipality may deem it necessary or proper to establish what is commonly called a 'white way.' "

This legislation found its source in chapter 152, Laws of New Jersey, 1917, Article XX, page 370.

There can be no question, therefore, that specific legislative authority for the erection of the standard in question by the City of Asbury Park is to be found in the three statutes in question and that this authority dates in the one case from the 1917 act and in the other from the 1923 law. An ordinance was enacted by the City of Asbury Park in

1921 which is Ordinance #335 (Record, pp. 74-a to 77-a), authorizing "bases for lamp standards in Ocean Avenue." In this connection it will be noted that the 1917 act hereinabove referred to authorized the municipality to proceed "by ordinance." The 1923 law did not require an ordinance. However, the municipality adopted one.

We have, then, two factors undeniably present; (a) specific legislation authorizing the construction. (b) an ordinance effectuating the grant of legislative authority. The decisions in New Jersey and in the Circuit Court of Appeals have held uniformly that where these two factors exist, the device erected pursuant to them cannot be deemed a nuisance. If it be an obstruction, it is a legalized obstruction of which the public is bound to take notice.

Being permanent in character, the municipality which created it cannot be held liable for an act of wrongdoing which has been held generally to consist of some act of a temporary nature as will be disclosed by an examination of the leading cases on the subject.

The case of *Lorentz* v. *Public Service Railway Co.*, 103 N. J. L. 104, 134 Atl. 818, a decision of the Court of Errors and Appeals of New Jersey, is practically dispositive of all the questions at issue in the instant case. An automobile collided with an elevated structure maintained by the defendant utility company on Central Avenue, Jersey City, New Jersey. It was shown that the structure was authorized by a New Jersey statute which contained a general authority to erect structures of that type. There was also an ordinance in Jersey City permitting its construction. Justice PARKER, speaking for the Court, said at page 818:

> "From what has been said, it should be sufficiently obvious that the structure in question was a lawful one, sanctioned by legislative and municipal author-

> ity. It is elementary, of course, that any unlawful obstruction of the highway is prima facie a nuisance, and that the party responsible for it is liable in damages to the one injured thereby. This was the theory of the leading case of *Durand* v. *Palmer*, 29 N. J. L. 544. But it is equally well settled that the legislature may legalize what would otherwise be a nuisance."

The petitioner in its brief in support of the petition for the writ of certiorari, at page 21, sets out in detail the language of the statute which the Court in the *Lorentz* case (*supra*) held authorized the erection of the elevated railroad structure which was the subject of that case. It is contended by the petitioner that this statute was specific in contradistinction to the statute involved in the instant case, maintaining that the statute authorizing the standards in question was not specific enough to come within the rules held by the state courts concerning legalized nuisances. However, a careful reading of this statute will disclose that it contains merely a general authority to erect structures of the type which was erected. It does *not* designate specifically the particular structure in Jersey City which the defendant erected. In other words, it is statutory authority of the same type as that under which the City of Asbury Park erected the standard in the instant case. It is applicable to all railway companies just as the statutes hereinabove set forth are applicable to all municipalities. It destroys the contention of the petitioner that there must be specific legislation applying to the particular structure in question in any given case in order that the structure, if it be deemed an obstruction, can be legalized.

Justice PARKER, in the *Lorentz* case (*supra*), said:

> "It is significant that neither in the trial court nor in this Court has the industry of counsel produced one decision in which recovery was had because of a

> collision with a legalized permanent obstruction in a highway, apart from some special misuse of such structure. Our own decisions on this phase are instructive as indicating the general rule by the exceptions to it. Thus, in *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, the ground of recovery was not the electric pole but some uninsulated wire left where the deceased could touch it."

Quoting *Matheke* v. *United States Express Co.,* 86 N. J. L. 586, 92 Atl. 399, with approval, Justice PARKER said:

> "Permanent encroachments upon the highway such as front door steps, hitching posts, awning poles, and this elevated railroad structure itself, are incidents of the highway of which the traveling public must take notice; but merely temporary obstructions to travel, such as an open area or coal chute, the piling up of building materials, a lowered arc light, or a sign or awning suspended so low as to impede travel, are matters as to which in the absence of knowledge or actual warning, the presumption is that no such obstructions to travel will be encountered."

The Court also quoted *W. B. Wood Co.* v. *Balsam,* 100 N. J. L. 275, 126 Atl. 480, with approval, as follows:

> "Those using the highway were obliged to take cognizance of this lawful construction and to govern themselves accordingly."

Finally the Court says:

> "It seems, therefore, clear and indeed is not denied that this elevated structure is a lawful structure erected pursuant to lawful public authority and essentially similar in characteristics to the elevated railroads in New York, Boston, Philadelphia, Chicago, and perhaps other large cities. Structures of this kind authorized by law and used to facilitate public travel, although they are physical obstruc-

> tions to drivers of ordinary vehicles and perhaps to pedestrians, are nevertheless not nuisances and the public must take notice of them.
>
> "The complaint counts, however, on the failure to light the columns so that they can more readily be seen at night, and the failure to clean them when they become dirty and dingy, but both these claims imply a duty and we find no such duty laid down in the statute or ordinance, and without some such requirement in one or the other, we are unable to say that any such duty existed. The right to erect and maintain the structure was conferred without any such qualification, and it seems reasonable to say that where neither the statute nor ordinance mentions the matter, it must be assumed that the ordinary public lighting of the street was considered sufficient in the premises."

*Lorentz* v. *Public Service Railway Co.* (*supra*), was followed and approved by the United States Circuit Court of Appeals for the Third Circuit in 1938 in *Delaware, Lackawanna & Western RR. Co.* v. *Chiara,* 95 Fed. 2nd, 663. A petition for certiorari was denied by the United States Supreme Court in 305 U. S., page 609. The facts and law involved in that case are almost identical with those in the instant case except for the fact that the defendant in the *Chiara* case was a railroad whose structure was authorized by statute and local ordinance, and in the instant case the defendant is a municipality whose structure was authorized by state statute. The Circuit Court of Appeals in its decision discussed practically all of the New Jersey cases involving legalized nuisances and concluded that the statute involved authorized the construction of a concrete chamber serving as a base of the central support of a railroad bridge erected and maintained by the defendant company. In applying each cited case, the Court looked for the presence

of legislative authority. Where it was found to be present, the Court held that the structure was not a nuisance and finally made the following pronouncement:

> "It follows, therefore, that the structure of the bridge, including the concrete chamber within the wagonway of Henderson Street, was lawful and that members of the public, including the appellees, were required to take notice of its presence and situation, and govern themselves accordingly.
>
> "In our opinion, the learned trial judge should have directed a verdict for the appellant as prayed for by it."

Surely it will be conceded that a municipality pursuant to legislative authority has power to erect a structure itself which it may authorize a private corporation to erect. Therefore, *Lorentz* v. *Public Service Railway Co.* (*supra*) and *Delaware, Lackawanna & Western RR. Co.* v. *Chiara* (*supra*) are undoubtedly authority for the proposition that the light standard in Asbury Park, erected pursuant to specific legislation and an ordinance adopted by the governing body of the municipality, was a lawful structure and that no action could lie as the result of a collision with it.

The principle enunciated in the two cases above discussed has long been recognized. In Dillon's "Municipal Corporations" (4th edition, vol. 2, p. 780) Professor Dillon says:

> "By virtue of its authority over public ways, the legislature may authorize acts to be done in and upon them or legalize obstructions therein which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that what-

> ever the legislature may constitutionally authorize to be done is, of course, lawful, and of such acts done pursuant to the authority given, it cannot be predicated that they are nuisances: If they were such without, they cease to be nuisances when having the sanction of a valid statute. As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted * * *
>
> "The legislature, instead of exercising directly this authority as to the uses of streets and public places, may authorize it to be exercised by local or municipal authorities."

The discretion reposed in the municipal authorities in the construction of the devices above referred to is indicated by reference to *Swift* v. *Delaware, Lackawanna & Western RR. Co.*, 66 N. J. Eq. 34, 57 Atl. 456, in which Vice-Chancellor EMERY discussed the exercise of such municipal power based upon statutory sanction, and said:

> "The municipal authorities are thus by the express terms of the act made the judges of what changes are necessary in order to secure either of these objects, and in the absence of fraud, their judgment that the change is necessary is final."

A careful reading of all the New Jersey decisions on the subject will indicate as already stated that New Jersey courts have adhered to the principle and that wherever recovery has been permitted, it has been because the legislative sanction did not exist or was not applicable. The petitioner has listed, at page 22 *et seq.* of its brief, the decisions of the courts of New Jersey upon which it relies to support its contention as to the alleged conflict between such decisions and the decision of the Court below. It is

obvious that these cases do not conflict with the authorities cited by the Circuit Court of Appeals in its opinion in the instant case, 139 Fed. 2nd, 888, in that all cases cited by the petitioner were without legislative authority despite the fact that the petitioner has inserted citations of a statute which it maintains apply. A reading of these cases will prove that they are barren of legislative authority.

The petitioner relies strongly upon the case of *Allas* v. *Rumson*, 115 N. J. L. 593, 181 Atl. 175, in its discussion of the rule of active wrongdoing. In *Allas* v. *Rumson* (*supra*) the Borough of Rumson constructed a ramp on its private property leading to the Borough Hall. The ramp extended from the public highway along one side of the Borough Hall to the public offices maintained on that side of the building. The ramp had no guard rails and the plaintiff in the night fell from it into an areaway and was injured The opinion of the New Jersey Court of Errors and Appeals, speaking through Justice HEHER, grounded the liability of the municipality upon active wrongdoing in the construction of the ramp. It will be perceived upon reading the case that no question of legislative authority for the construction of the ramp arose. The question of legislative authority is not even discussed in the Court's opinion and the defendant Borough cited no legislative sanction for the construction of the ramp. The case turned upon the question whether a municipal corporation is responsible for negligence as compared with its liability for active wrongdoing or misfeasance. Justice HEHER said:

> "There is, of course, a well recognized distinction in respect of liability for negligence between the exercise of a governmental function or duty imposed upon the municipality by law for the benefit of the public and from the performance of which no profit

> or advantage is derived, and powers conferred for the accomplishment of corporate purposes essentially special or private in character, in respect of which the municipality stands upon the same footing as a private corporation."

Throughout the Opinion the Court distinguishes between active wrongdoing or misfeasance on the one hand and mere negligence or the failure to perform a duty on the other, saying:

> "The active wrongdoing must be chargeable to the municipality in order to render it liable,—that is where a municipality directs its employee to dig a hole in a public highway and leaves it unguarded or participates in some other act of misfeasance of its employee through which a person suffers injury."

There is nothing in the Opinion in *Allas* v. *Rumson* (*supra*), which overthrows or modifies in any way the principles laid down in the cases above cited. There is nothing in it which by any possible construction abrogates the rule that a municipality may erect a device on the highway with legislative authority.

The cases cited by the petitioner in its brief all present two features:

1. Absence of legislative authority for the construction of the device in question;
2. Active wrongdoing in the construction of the device in question.

When they are analyzed, it will be seen that they really represent an application of the rule or rather the distinction laid down in *Matheke* v. *United States Express Company* (*supra*), in which Mr. Justice GARRISON illustrated the distinction between permanent encroachments upon the

highway and "merely temporary obstructions to travel such as an open area or coal chute, the piling up of building material * * * are matters to which, in the presence of knowledge or actual warning, the presumption is that no such obstructions to travel will be encountered." In the *Allas* case and the other cases in which it was cited and followed, there was a complete absence of legislative authority for the structure or there was some act of a temporary nature constituting active wrongdoing or misfeasance.

The petitioner attempts to invoke the jurisdiction of this Honorable Court on the ground that there is an important question of local law probably in conflict with local decisions. We respectfully maintain that this is not so but that the Circuit Court of Appeals, in reversing the judgment of the District Court, followed the basic and settled law of the State of New Jersey in holding that the standard in question was a structure erected pursuant to legislative authority.

We respectfully submit that instead of the decision of the Court below being contrary to the statutes of the State of New Jersey and in conflict with the decisions of the courts of that State, it is in accord therewith and in full reliance thereon as its Opinion shows.

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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